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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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MAY 01 2012

DATE:

OFFICE: NEBRASKA SERVICE CENTER

FILE: 


IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences, the arts or business. The petitioner seeks employment as a Montessori teacher at Tempe Montessori School in Mesa, Arizona. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner failed to submit the required initial evidence with the petition.

On appeal, the petitioner submits a brief from counsel and copies of supporting exhibits.

Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –

(A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer –

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The U.S. Citizenship and Immigration Services (USCIS) regulations at 8 C.F.R. § 204.5(k)(3) state that the petition must be accompanied by documentation showing that the alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business:

(i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

(ii) To show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:

(A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

The petitioner filed the Form I-140 petition on October 29, 2009. In support of the petition, the petitioner submitted four supporting exhibits:

1. A June 9, 2009 letter from [REDACTED] executive director of the [REDACTED] – USA (AMI), indicating that “AMI diploma holders have received the highest caliber of Montessori teacher training available.”
2. A copy of a June 21, 2009 letter from [REDACTED] director of training at the Montessori Education Center of [REDACTED] indicating that the petitioner earned a “Primary Teaching Diploma in Montessori Education” in 2004.
3. A partial copy of a “Montessori Diploma” that AMI issued to the petitioner. The partial copy does not show a date.
4. A copy of an AMI pamphlet entitled “Become a Montessori teacher,” which indicated that “[a]ll centers require a bachelor’s degree” of their teachers.

Counsel, in an accompanying cover letter, referred to the petitioner as “an alien of exceptional ability,” but did not explain how the above exhibits establish the petitioner’s exceptional ability.

Concurrently, the petitioner filed a Form I-485 adjustment application, which included Form G-325A, Biographic Information, indicating that the petitioner had been a teacher at Tempe Montessori School since May 2002.

The director denied the petition on January 25, 2010, stating: “The petition was submitted without the required initial evidence.” The director quoted several USCIS regulations, including two regulatory definitions from 8 C.F.R. § 204.5(k)(2):

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

The director also quoted the USCIS regulation at 8 C.F.R. § 103.2(b)(1), which requires the petitioner to establish eligibility at the time of filing the petition, and the regulation at 8 C.F.R. § 103.2(b)(8)(ii), which states, in part: “If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence.”

On appeal, counsel states that the petitioner met her burden of proof by submitting “five items . . . with the I-140 petition and its concurrently filed adjustment application.” Counsel then listed three of the items that had accompanied the petition, the Form G-325A submitted with the adjustment application, and a “letter from the U.S. Department of Labor reflecting that the petitioner was the subject of a successful labor certification in April 2006” (counsel’s emphasis).

The record does not show that any letter from the Department of Labor accompanied the initial filing of the petition. Nevertheless, the petitioner submits a copy of the letter on appeal, and the AAO will consider it here. The letter does indicate that Temple Montessori School had obtained a labor certification on the alien’s behalf in April 2006, but it did not result in the approval of any immigrant petition on the alien’s behalf.

The submitted materials do not meet the petitioner’s burden of proof as counsel claims. Counsel, on appeal, abandons the previous claim of exceptional ability, and instead asserts that the AMI diploma, letter from the Montessori Education Center of Arizona, and Form G-325A collectively “show [that the petitioner has] more than five years of progressive experience.”

As quoted above, the USCIS regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the petitioner to submit “[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.”

The petitioner’s initial submission contained no official academic record of any degree, let alone any degree equivalent to a United States baccalaureate or advanced degree. The “Montessori Diploma” showed the petitioner’s completion of a short-term specialized vocational training class, rather than her completion of a baccalaureate-level course of study.

Furthermore, the petition did not include letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty. Form G-325A constitutes a claim by the petitioner, rather than evidence in support of that claim, and it cannot take the place of the required employer letters.

The USCIS regulation at 8 C.F.R. § 103.2(b)(2)(i) states:

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

Here, the petitioner has not submitted required primary evidence or accounted for its absence. Therefore, even if the petitioner had originally claimed eligibility as a member of the professions holding the equivalent of an advanced degree (which she had not done), the record supports the director’s finding that the petitioner did not submit the required initial evidence to show that the petitioner holds an advanced degree or its defined equivalent.

The remaining issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term “national interest.” Additionally, Congress did not provide a specific definition of “in the national interest.” The Committee on the Judiciary merely noted in its report to the Senate that the committee had “focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (NYSDOT), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The USCIS regulation at 8 C.F.R. § 204.5(k)(4)(ii) states that, to apply for the national interest waiver, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate, as well as evidence to support the claim that such exemption would be in the national interest. The petitioner did not submit Form ETA-750B or the corresponding sections of its successor document, ETA Form 9089.

Also, at the time of filing the petition, counsel did not explain how any of the submitted evidence supported the claim that the waiver would be in the national interest. On appeal, counsel states that the letter from [REDACTED] “was offered to show that the petitioner works in an area of substantial intrinsic merit (education). This letter was also offered to show that the proposed benefits of petitioner’s work (educating children who will live and work and contribute throughout the United States) would be national in scope.”

The intrinsic merit of education is not in dispute, but the submitted letter does not establish that the work of an individual Montessori teacher is national in scope. [REDACTED] never stated that that the occupation had national scope. Furthermore, the *NYSDOT* precedent decision includes a passage that is exactly on point: “while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act.” *Id.* at 217, n.3.

Counsel, on appeal, addresses the “intrinsic merit” and “national scope” prongs of the *NYSDOT* national interest test, but does not address the third prong concerning the individual alien’s contributions. Instead, counsel contrives a different third prong. Under the bold-type heading “**Substantial intrinsic merit, national in scope, prior labor certification,**” counsel asserts: “The letter from the U.S. Department of Labor was offered to show that the position petitioner wishes to work in (AMI Montessori Teacher) was already the subject of a labor certification that concluded there are no willing, able or qualified AMI certified teachers in Arizona.”

“Prior labor certification” is not a criterion for the national interest waiver, and it neither shows nor implies that it would be in the national interest to approve the present petition without an approved labor certification. There exists no blanket waiver to exempt all AMI-certified Montessori teachers from the job offer/labor certification requirement, and the petitioner has submitted nothing to show that she stands apart from other AMI-certified Montessori teachers.

The director correctly found that the petitioner had not submitted evidence to qualify her for the national interest waiver, and acted properly in denying the petition on that basis. The petitioner has not established that she qualifies for the immigrant classification sought, or for the additional benefit of the national interest waiver of the statutory job offer requirement.

The AAO will dismiss the appeal for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.